(8)

No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN and JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

CORRECTED COPY

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QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

PARTIES TO THE PROCEEDING

The petitioners are Swidler & Berlin and James Hamilton. The parties to the proceeding in the Court of Appeals were Swidler & Berlin, James Hamilton and the United States of America.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority opinion of the court of appeals and a redacted version of the dissenting opinion are reported at 124 F.3d 230 and are printed in full text at Pet. App. 1a-26a.[1] The court's order on petition for rehearing, and the opinion dissenting from denial of rehearing (Pet. App. 27a-32a), are reported at 129 F.3d at 637. The district court issued a separate opinion for each of the two subpoenas involved. The opinions, which are iden-

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[1] After the opinions were published, the court of appeals entered an order unsealing, among other things, the redacted portions of Judge Tatel's dissent. Order dated January 12, 1998, D.C. Cir. No. 97-3006. Consequently, the appendix to the petition for certiorari (hereinafter Pet. App.), which was filed after the unsealing order, contains an unredacted version of Judge Tatel's dissent.

tical except for docket numbers and captions, are not reported and are printed (with redactions not relevant here) at Pet. App. 32a-42a and 43a-53a.

JURISDICTION

The court of appeals entered its judgment on August 29, 1997. The court entered an order denying a timely petition for rehearing on November 21, 1997. The petition for certiorari was filed December 31, 1997. The petition was granted March 30, 1998. On April 6, 1998 the Court expedited consideration of this case. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 501 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure appear at Pet. App. 54a-56a.

STATEMENT

On July 11, 1993, in the midst of intense public controversy about the White House Travel Office, White House Deputy Counsel Vincent Foster met with Washington, D.C., attorney James Hamilton to discuss his and the White House's possible needs for legal representation. In anticipation of the meeting, Mr. Hamilton read and made notes on a report issued by the White House on the Travel Office matter. Pet. App. 40a. He and Mr. Foster then spoke for two hours, during which Mr. Hamilton took three pages of handwritten notes. Pet. App. 31a. Before the conversation began, Mr. Foster sought and received assurances from Mr. Hamilton that the conversation was privileged. Pet. App. 25a. This is confirmed by Mr. Hamilton's December 18, 1995 Affidavit, which recounted that Mr. Foster "made clear at the outset that this was a 'privileged' conversation." JA 5. Indeed, one of the first entries in the notes is the word "Privileged," reflecting this exchange between them. Pet. App. 41a.

Mr. Hamilton's Affidavit also states that, in addition to including information provided by Mr. Foster that Mr. Hamilton saw fit to record, the notes contain his "mental impressions, observations, conclusions, and plans for action." JA 5. And as Judge Tatel said, "[t]he notes bear the marking of a lawyer focusing the words of his client; he underlined certain words, placing both check marks and question marks next to certain sections." Pet. App. 31a.

Nine days after the meeting, Mr. Foster committed suicide in Fort Marcy Park in Virginia. Over two years later, on December 4, 1995, a federal grand jury, at the request of Independent Counsel, issued subpoenas to Mr. Hamilton and his law firm, Swidler & Berlin, seeking Mr. Hamilton's notes.

Mr. Hamilton and his firm moved to quash or modify the subpoenas. The district court (Chief Judge Penn) inspected the notes *in camera*. He found that "Hamilton met with Foster to discuss possible representation of Foster," "that Foster spoke with Hamilton as an attorney and [that] a review of the notes supports that finding." Pet App. 41a. He held that "one of the first notations on the [notes] is the word: 'Privileged,' so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation." Pet. App. 41a. He also found that the notes were prepared in anticipation of litigation and "reflect the mental impressions of the lawyer." Pet. App. 42a. The district court concluded that both the attorney-client and work product privileges barred disclosure. Pet. App. 41a, 42a.

The Court of Appeals for the District of Columbia reversed. Recognizing that "[t]he parties agree that the communications at issue would be covered by the [attorney-client] privilege if the client were still alive," the court concluded that "the client's death calls for a qualification of the privilege." Pet. App. 2a. The "qualification" created by the court would permit "post-death

use [of the otherwise privileged communication] in criminal proceedings" where the prosecutor convinces the trial court that the "relative importance [of the communication] is substantial." Pet. App. 10a. The court declared that the prosecutor is entitled to obtain privileged communications that "bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 10a. On the other hand, "[w]here there is an abundance of disinterested witnesses with unimpaired opportunities to perceive and unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality." *Id.* Independent Counsel in his briefs had not argued for such a balancing process.

The court of appeals reasoned that the prospect of post-death revelation in the criminal context will trouble a client less than in the civil context, because after death "criminal liability will have ceased altogether" while civil liability "characteristically continues." Pet. App. 6a. The court recognized that a concern for survivors might stir a desire to protect the client's estate from civil liability, but did not discuss whether the same concern might foster an interest in protecting the living from criminal penalties. Pet. App. 6a. The court also "doubt[ed]" that the client's concerns for post-death reputation would be "very powerful; and against them the individual may even view history's claims to truth as more deserving." Pet. App. 7a. The court added that, "[t]o the extent . . . that any post-death restriction of the privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil." Pet. App. 7a.

As to the other side of the balance, the court concluded that the client's death heightens the prosecutor's need for otherwise privileged communications. The court concluded that "unavailability through death, coupled with

the non-existence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after death of the client)" where the privilege should give way upon the prosecutor's showing of need. Pet. App. 7a-8a.

The court of appeals also held that the notes were not protected by the work product privilege. The court recognized prior decisions holding that attorney interviews conducted "as part of a litigation-related investigation" receive heightened work product protection even as to factual material, because "the facts elicited necessarily reflected a focus chosen by the lawyer." Pet. App. 13a. However, the court concluded that the present case is different because

> the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures.

Id. Because of the court's conclusive presumption that, at this stage, the lawyer "has not sharply focused or weeded the materials," it found that the notes did not deserve the "super-protective envelope" normally afforded opinion work product. Pet. App. 13a-14a. The Court remanded the case to the district court for reexamination of the notes in light of its opinion as to both the attorney-client and work product issues.

Judge Tatel dissented. While conceding that concern for surviving friends and family or posthumous reputation "may not influence *every* decision to confide potentially damaging information to attorneys," Judge Tatel concluded that "these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations." Pet. App. 23a (emphasis in orig-

inal). Judge Tatel argued that, after the court's decision, such persons will not talk candidly with a lawyer after they receive the advice the court's opinion now requires lawyers to give:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Pet. App. 20a (emphasis in original). Judge Tatel concluded that the court's decision "strikes a fundamental blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society." Pet. App. 26a.

The court of appeals denied rehearing *in banc*, with two judges dissenting as to the attorney-client privilege issue (Judges Tatel and Ginsburg).[2] Pet. App. 28a. The dissent emphasized that Independent Counsel had offered no evidence that abrogating the attorney-client privilege after death will not chill client communications with attorneys. Pet. App. 29a-30a. Such evidence, the dissent argued, is required to overturn the common law rule that the privilege survives death—a rule resting on the proposition that it is necessary to promote candid client disclosures.

Judge Tatel also dissented on the work product issue. He disgreed with the court's conclusive presumption that attorney notes taken at an initial client interview do not reflect the attorney's mental impressions because the lawyer does not "sharply focus[] or weed[]" the words of a client at an initial session. Pet. App. 30a. Instead, Judge Tatel argued, "lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients." *Id.*

[2] Judges Sentelle and Garland did not participate.

> Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the "opinions, judgment, and thought processes of counsel."

Pet. App. 31a (citation omitted). In this case, Judge Tatel said, the notes demonstrate that Mr. Hamilton "actively exercised his judgment when interviewing his client," because "[i]n two hours, he created only three pages of notes," in which he "underlined certain words, placing both check marks and question marks next to certain sections." Pet. App. 31a. Consequently, Judge Tatel concluded, "[t]he notes clearly represent the opinions, judgment, and thought processes of counsel," the same conclusion the district court had reached. *Id.*

SUMMARY OF ARGUMENT

1. Persons who expect to die soon—whether because of advanced age, illness, suicide, or a dangerous life-style—have the right to consult attorneys in confidence about criminal matters that threaten friends, associates, family or their own reputations. The court of appeals' decision denies them that right, and thus discriminates against the dying. More broadly, the decision also defeats the fundamental purpose of the privilege, which is to encourage full and frank communication between attorneys and clients and thereby promote observance of law and the administration of justice. In so doing, it potentially will affect adversely, on a daily basis, innumerable conversations between clients and their attorneys, as amici attorney associations confirm.

The court of appeals erroneously assumes that persons facing death do not care whether their friends, associates, family, or their own reputations are harmed by disclosures

after death in criminal proceedings. This assumption ignores the fact that people write wills, establish trusts, buy life insurance and burial plots, establish foundations, endow chairs, and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death.

The adverse effect of the court of appeals' decision on client candor is not ameliorated by limiting disclosure to criminal proceedings, and by requiring the prosecution to demonstrate that it needs the evidence. An elderly or ill person may be far more troubled by the prospect of a loved one's suffering a criminal sanction, than by potential civil liabilities that might diminish the family's inheritance. And a case in which the prosecution needs the evidence is exactly the kind of case where the prospect of disclosure would most trouble the client.

Moreover, the court of appeals' balancing test results in substantial uncertainty and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Making the promise of confidentiality contingent upon the outcome of an uncertain balancing test "would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996).

Rule 501 of the Federal Rules of Evidence requires federal courts to consider "reason and experience" in interpreting the common-law privileges. The great weight of case law holding that the privilege survives death (except in the testamentary context), as well as the numerous state statutes to the same effect, reflect both "reason" and "experience," which instruct that client candor will be chilled if clients know that the privilege may evaporate after their death.

There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will do little damage. In particular, the testamentary exception, which was in large part designed to effectuate the client's intent, should not be relied on to frustrate that intent by permitting testimony that may inflict criminal sanctions on the client's friends, family or associates. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. The argument that one more exception can do little harm can lead only to progressive erosion of the privilege.

2. The court of appeals' decision refusing to accord heightened work product protection to the notes was fatally infected by its unsupportable presumption, which Independent Counsel does not defend, that lawyers at initial client interviews do not exercise professional judgment in determining what client statements to record and how to record them. This presumption is belied by the experience of seasoned practicing attorneys, whose views are represented by amici attorney associations, and by the record in this case. Clients typically choose attorneys because of their professional background and experience. Mr. Hamilton brought to the Foster interview extensive experience in highly-publicized, "political" cases. He also had prepared for the interview by reading a recently-issued White House report on the Travel Office matter. During the course of a two-hour interview, he took only three pages of notes, clearly exercising judgment as to what to record. His actions vividly illustrate the unrealistic nature of a presumption that lawyers at initial interviews are simply passive recorders of what clients say.

This Court's leading decisions on the work product privilege have accorded "special protection" to attorney notes of witness interviews, because " 'what [the attorney] saw fit to write down regarding witnesses' remarks' " reflects the attorney's mental impressions, which the privilege is designed to protect. *Upjohn Co. v. United States, supra*, 449 U.S. at 399-400, quoting *Hickman v. Taylor*, 329 U.S. 495, 513 (1947). Redaction does not resolve the issue; it may serve to eliminate the attorney's explicit ex-

pressions of opinion, but disclosure of the "factual" portions of the notes inevitably reveals the attorney's selection of what was "fit to write down."

The court of appeals' erroneous presumption that attorneys do not bring their professional judgment to bear in initial client interviews led it to conclude that the ordinary standard of need under Federal Rule of Civil Procedure 26 should be applied in determining whether the privilege pertains, rather than the heightened standard required by *Hickman* and *Upjohn*. Allowing the prosecution to obtain attorney interview notes based on the ordinary standard of need will destroy the "privileged area within which [the attorney] can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). When taking interview notes, an attorney cannot possibly know how a court might view a prosecutor's later assertion of need, and if disclosure hinges on such assertion, both attorney and client would be at peril whenever the attorney takes notes. The inevitable result would be that "much of what is now put down in writing would remain unwritten"—degrading the quality of case preparation and, ultimately, the administration of justice. *Hickman v. Taylor, supra*, 329 U.S. at 511.

ARGUMENT

I. THE PRIVILEGE PROTECTING COMMUNICATIONS BETWEEN CLIENT AND ATTORNEY SURVIVES THE CLIENT'S DEATH.

As Judge Tatel found, and the views of thousands of seasoned lawyers represented by amici attorney associations confirm, the court of appeals' decision strikes a "fundamental blow" to the attorney-client privilege.[3] Indeed, the decision discriminates against the aged, the diseased, and the distraught—against the most vulnerable in our society—by denying them the right to consult a lawyer in

[3] It is also a direct attack on Mr. Foster's desire and intention that the conversation at issue remain privileged.

confidence.[4] Reason and experience, whose consideration Federal Rule of Evidence 501 demands, do not allow this badly flawed decision to stand.

1. The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is "rooted in the imperative need for confidence and trust" between client and attorney, without which the client is not likely to reveal facts that may be deeply embarrassing or incriminating. *Trammel v. United States*, 445 U.S. 40, 51 (1980). The attorney must "know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* The privilege thus is "justified . . . by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (*quoting Trammel*, 445 U.S. at 50).

For practicing lawyers, the privilege is vital. "[T]he problem of the guarded half-truths of the reticent client is familiar to [lawyers] in their day-to-day work." 1 *McCormick on Evidence*, § 6 at 353 (4th ed. 1992). Ability to give an unqualified assurance of confidentiality is necessary for the lawyer seeking to persuade a nervous or reluctant client to tell the whole truth. But under the court of appeals' decision, the lawyer cannot give unqualified assurance. Instead, the lawyer must tell the client that "when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution." Pet. App. 20a. For a client who is elderly, severely ill, suicidal or has other reason to expect imminent death, such a statement would

[4] Amicus National Hospice Organization supports Petitioners because the decision discriminates against the dying.

sound more like a *Miranda* warning than an assurance of confidentiality.

This Court has recognized that "the privilege has the effect of withholding relevant information from the fact-finder." *Fisher v. United States*, 425 U.S. 391, 403 (1976). For that reason, the privilege applies only "where necessary to achieve its purpose." *Id.* But where the purpose of the privilege is implicated, it must be applied in order to "encourage clients to make full disclosure to their attorneys." *Id.* And where the privilege applies, it bars the grand jury from obtaining the privileged information. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

Moreover, the fact-finder's loss is more apparent that real. Because the privilege only protects communications "which might not have been made absent the privilege," *Fisher v. United States, supra*, 425 U.S. at 403, the fact-finder loses access only to a communication that may never have been made without an assurance of confidentiality. "Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee v. Redmond, supra*, 518 U.S. at 12. "This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Id.*

The facts of this case are vivid illustration of how the privilege creates information, rather than suppressing it. The district court found that "one of the first notations on the [notes] is the word: 'Privileged', so it is obvious that . . . Foster . . . viewed . . . notes of that conversation as privileged." Pet. App. 25a. Indeed, as this notation reflected and Mr. Hamilton's Affidavit confirms, Mr. Foster had asked Mr. Hamilton before the conversation began whether it was privileged and received assurances that it was. Pet. App. 41a. Thus the conversation likely would not have taken place—and there would have been no notes to subpoena—had Mr. Hamilton not given this assurance of confidentiality. JA 5, Pet. App. 25a. The con-

versation occurred just nine days before Mr. Foster took his own life, and apparently within hours of when he wrote his now famous note stating, in obvious reference to himself, that in Washington "ruining people is considered sport."[5] While we will never know his precise thoughts, it is likely that he would have been reluctant to confide had he been told that the conversation was privileged *unless you die*.

In arguing that the client's death creates a greater need for the information, the court of appeals asserts—contrary to the policy underlying the privilege as well as the case law applying it—that need for the information overcomes the privilege. That argument ignores the fact that the information might well not exist but for the privilege. As Judge Tatel observed, that argument also would justify abrogating the privilege whenever the witness is unavailable for any reason.[6] And it ignores the prevailing federal and state case law recognizing that, where the privilege applies, it is absolute and may not be overcome by a showing of the fact-finder's need. "[I]f a party demonstrates that the attorney-client privilege applies, the privilege affords all communications between attorney and client absolute and complete protection from disclosure." *In re Allen*, 106 F.3d 582, 600, *rehearing in banc denied*, 119 F.3d 1129 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 689 (1998). "Assuming the requisite relationship and confidential communication, the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar

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[5] Fiske, *Report of the Independent Counsel In Re Vincent W. Foster, Jr.*, pp. 13-14 and Exh. 5 (June 30, 1994).

[6] However, *Valdez v. Winans*, 738 F.2d 1087 (10th Cir. 1984), held in a habeas proceeding that an accused's constitutional rights were not violated when the state trial court sustained a claim of attorney-client privilege to bar testimony by an attorney that her client, rather than the defendant, committed the crime. In that case the client was not dead, but was unavailable to testify because he had invoked the Fifth Amendment.

to the case." *Gordon v. Superior Court,* 65 Cal. Rptr. 2d 53, 59 (Cal. Ct. App. 1997); *Westinghouse Elec. Corp. v. Republic of Philippines,* 951 F.2d 1414, 1429 (3d Cir. 1991) ("The work-product doctrine recognizes a qualified evidentiary protection, in contrast to the absolute protection afforded by the attorney-client privilege."); *Kujawa v. Manhattan Nat'l Life Ins. Co.,* 541 So.2d 1168, 1169 (Fla. 1989) (attorney-client privilege provides "absolute immunity from disclosure"); *National Sec. Fire & Cas. Co. v. Dunn,* 705 So.2d 605, 608 (Fla. Dist Ct. App. 1997) ("Notwithstanding a litigant's entitlement to work-product material upon a showing of need and undue hardship, the attorney-client privilege is absolute."); *Spectrum Systems Int'l Corp. v. Chemical Bank,* 581 N.E. 2d 1055, 1060 (N.Y. 1991) (attorney-client communications entitled to "absolute immunity" from discovery).

2. There is no basis for the court of appeals' conclusion that the purpose of affording absolute protection to attorney-client communications as to criminal matters evaporates when the client dies. The court of appeals explicitly and wrongly assumes that persons facing death do not care whether their own reputations are harmed by disclosures after death in criminal matters. The court implicitly and wrongly assumes that the dying do not care about the post-death impact of criminal proceedings on their family, friends and associates. These assumptions are contrary to the "reason and experience" that Rule 501 requires the federal courts to consider in interpreting the attorney-client privilege. People write wills, establish trusts, buy life insurance and burial plots, invest in their children's education, establish foundations, endow chairs and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death.

Concern for the well-being of others comports with the finest traditions of our culture and religious heritages. The Bible exhorts us to care for others and to "love your

neighbor as yourself."[7] Our national tradition celebrates those who devoted their lives to serving others. We observe, for example, national holidays on the birthdays of Presidents Washington and Lincoln and Dr. Martin Luther King. Most of us fall short of the standards set by our faiths and our national heroes, but many Americans give generously to charities and exhibit concern for others in their daily lives. And most of us also have family, friends and associates we would not want to harm—before or after our death. To argue that concern for others does not typically extend beyond death is to posit a callous self-centeredness that is inconsistent with common experience.

Nor is it correct to suggest, as does one academic commentator cited by the court of appeals, that ordinary people have no concern for their reputation following death and to disparage any such concern as "Pharaoh-like." Pet. App. 4a, quoting 24 Wright & Graham, *Federal Practice and Procedure* § 5498, at 484 (1986). This far too dismissive comment overlooks the fact that many persons adhering to more contemporary faiths place great store in the value of a good name. Concern for one's own reputation is a value celebrated by the Bible[8] and our culture's great literary works;[9] it is hardly an outdated relic of ancient times. And plainly, "peoples' concern with reputation may well be socially desirable and hence worth encouraging. For if individuals did not care about their name, including after their death, they would likely behave worse—morally and legally—while alive." Frankel, *The Attorney-Client Privilege After the Death of the Client,* 6 Geo. J. Legal Ethics 45, 63 (1992).

Thoughts about how one will be remembered by his family, friends and community, are quite likely to emerge

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[7] *Leviticus* 19:18; *Mark* 12:31.

[8] "A good name is rather to be chosen than great riches." *Proverbs* 22:1.

[9] "The purest treasure mortal times afford [i]s spotless reputation." Shakespeare, *Richard II,* Act I Scene 1.

shortly before death. Such thoughts could well make a client fearing posthumous disclosure chary about revealing sensitive, personal matters to an attorney.

As Judge Tatel remarked in dissent, this case is a particularly inappropriate one in which to abrogate the posthumous protection of the privilege. Mr. Foster, shortly before his death, gave a law school commencement speech emphasizing the high value he placed on personal reputation. Pet. App. 23a. Indeed, Independent Counsel Starr's report on Mr. Foster's death stressed that his "public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance." Starr, *Report of the Office of Independent Counsel on the Death of Vincent W. Foster, Jr.*, at 98 (1997). Independent Counsel Fiske and even Independent Counsel Starr (who now generally minimizes the concern for posthumous reputation) both concluded that attacks on Mr. Foster's reputation and others could have contributed to the depression that caused him to take his own life. *Id.* at pp. 105-10; Fiske, *Report of the Independent Counsel In Re Vincent W. Foster, Jr.*, pp. 8-17 (1994).[10]

The court of appeals expressed "doubt" that an individual's "residual" interest in post-mortem reputation "will be very powerful," suggesting that "the individual may even view history's claims to truth as more deserving." Pet. App. 7a. But anyone familiar with memoirs knows that most people who speak "for history" tend to choose words with extreme care. "Most public servants' memoirs turn out to be self-serving exercises in which their political decisions are retrospectively interpreted in the best possible

[10] Mr. Fiske also relates how Mr. Foster, upset that a colleague was reprimanded in the Travel Office matter, sought instead to take the blame himself. *Id.* at p. 12. Mr. Foster's now famous note—likely written within hours of his visit to Mr. Hamilton—says, in obvious reference to himself, that in Washington "ruining people is considered sport." *Id.* at pp. 13-14 and Exh. 5. The note also complains that "the public will never believe the innocence of the Clintons and their loyal staff." *Id.* at Exh. 5. His concern for both his reputation and the well-being of others is evident.

light." [11] A respected recent memoirist described how he went through his final draft "with a fine tooth comb" to assure that, while being honest, he would "not, at the same time, be hurtful," because he knew "everything you say will be in print forever." [12] The attorney-client privilege is designed to ensure that persons speak with counsel with candor and do not edit their statements with a "fine tooth comb."

There are many public people who feel, with considerable justification, that there is some information as to which the claims of privacy outweigh the claims of history. Justice Black, on the eve of his death, directed that certain of his Court papers be destroyed, in order to preserve the confidentiality of the Court's deliberations.[13] Some years ago, there was strong criticism of a psychotherapist who released tapes of his sessions with the poet Anne Sexton, 17 years after her suicide, to the writer of a biography published 10 years later.[14] Whether these con-

[11] "We Can All Learn from McNamara's Memoirs," New York Times (Apr. 13, 1995) at p. A24.

[12] "Colin Powell Talks About His Family, 'the Producers' and the Making of a Memoir," Chicago Tribune (Aug. 26, 1996) at p. C3. If we may be so bold, we also submit that judges carefully write opinions with a view to the opinion of posterity.

[13] Newman, *Hugo Black* 621-622 (1994). Only his conference notes were destroyed. Justice Black explained to his son that "reports by one Justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect history." Wigdor, *The Personal Papers of Supreme Court Justices* 48 (1986).

[14] The therapist who released the tapes was "excoriated" by the president of the American Academy of Psychoanalysis and the chairman of the ethics committee of the American Psychiatric Association. "Dead Poet's Confidences an Open Book," Cleveland Plain Dealer (Sept. 22, 1991), 1991 WL 4521561. Another commentator on the incident, a writer and psychiatrist, stated that "[m]ost authors I know are very invested in what reputation might outlive them." Ablow, "Whose Life Is It, Anyway?; Keeping Confidences Shared in Psychotherapy," Washington Post (Sept. 24, 1991), 1991 WL 2117233. Although the tapes were released with the consent

cerns are right or wrong is not paramount. What is important is that many people feel strongly that there is a zone of privacy that should be respected even after death. Such feelings would inhibit candor where a person who is elderly, ill or suicidal is told that the privacy of conversations with an attorney may not be respected following death.

The court of appeals cited academic commentators who stated that few clients are much concerned about what will happen after "the death that everyone expects but few anticipate in an immediate or definite sense." Pet. App. 5a, quoting 2 Mueller & Kirkpatrick, *Federal Evidence* § 19, at 380 (1994). But the attorney-client privilege does not exist only for the benefit of young, healthy clients, for whom death may be a remote prospect. While it may be that those who are blessed with the insouciance of youth have no concerns about their passing, those of us burdened by the exigencies of advancing age, infirmity and distress also are entitled to obtain confidential legal advice. Every year, hundreds of thousands of Americans learn that they have a life-threatening illness.[15] Every year, millions of Americans, even those fortunate enough to retain good health, reach an age at which thoughts of mortality intrude. These people—as well as others who are

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of the potet's daughter and literary executor, this commentator compared the therapist who released them to "a priest who, at the family's request, makes available the confessions of a deceased parishioner." *Id. See also*, "Release of Poet's Therapy Tapes Called a Breach of Confidentiality Ethics: Psychiatrist criticized for giving Anne Sexton's biographer access to the recordings, even 17 years after Pulitzer Prize winner's suicide," Los Angeles Times (Aug. 11, 1991), 1991 WL 2245191.

[15] In 1993, some 566,000 persons died of cancer or as a consequence of HIV infection. U.S. Department of Commerce, *Statistical Abstract of the United States 1996*, at 96. Given the nature of these diseases, most of these persons likely were aware for some period of time that they would die soon. The American Cancer Society estimates that there were 1.3 million new cancer cases in 1996. *Id.* at 145.

suicidal or engaged in hazardous lifestyles—are entitled to consult an attorney in confidence. Indeed, people in the final stages of life frequently feel a particular need to speak with an attorney to put their own affairs in order or to resolve family or business problems. But under the court of appeals' decision, those people may lose their right to do so in confidence.

3. The overwhelming majority of decided cases supports the conclusion that the attorney-client privilege survives the client's death. Seven states have held that the attorney-client privilege survives the death of the client in criminal proceedings.[16] The Ninth Circuit and 19 states have held that the attorney-client privilege survives the client's death in civil cases.[17] The only decision to the

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[16] The following decisions excluded from criminal proceedings evidence of communications between a deceased person and that person's attorney: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *In re a John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 829 (Cal. Ct. App. 1984); *Cooper v. Oklahoma*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981).

[17] The Ninth Circuit cases are *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977) and *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 815 (9th Cir. 1942). In *Osborn*, the disclosure had criminal implications; the district court had allowed intervenors to claim the Fifth Amendment privilege as to some documents at issue. 561 F.2d at 1336.

State cases holding that the privilege survives in civil proceedings are: *Fox v. Spears*, 93 S.W. 560 (Ark. 1906); *Doyle v. Reeves*, 152 A. 882 (Conn. 1931); *De Loach v. Myers*, 109 S.E.2d 777 (Ga. 1959); *Hitt v. Stephens*, 675 N.E.2d 275 (Ill. App. Ct.), *appeal denied*, 679 N.E.2d 380 (Ill. 1997)); *Estate of Voelker*, 396 N.E.2d 398 (Ind. Ct. App. 1979); *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970); *Stegman v. Miller*, 515 S.W.2d 244, 246 (Ky. 1974); *Morris v. Cain*, 1 So. 797, 807-8 (La. 1887); *Tillinghast v. Lamp*, 176 A. 629, 632 (Md. 1935); *Rich v.*

contrary is from a mid-level state appellate court that until two months ago had never been followed.[18] *None of these cases recognizes a distinction between the civil and criminal contexts.* This Court has stressed the importance of uniformity between federal and state court decisions, because a state promise of confidentiality would have little value if the client is aware that disclosure may be ordered by a federal court. *Jaffee v. Redmond, supra,* 518 U.S. at 13.

State courts, making no disinction between civil and criminal matters, also have held that other similar privileges survive death: the privilege for marital communications,[19] the patient-physician and patient-psychotherapist

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Fuller, 666 A.2d 71, 74-75 (Me. 1995); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. Ct. App. 1976); *Lorimer v. Lorimer*, 83 N.W. 609 (Mich. 1900); *Lennox v. Anderson*, 1 N.W.2d 912 (Neb.), *modified on other grounds*, 3 N.W.2d 645 (Neb. 1942); *Clark v. Second Judicial District Court*, 692 P.2d 512 (Nev. 1985); *Scott v. Grinnell*, 161 A.2d 179, 183 (N.H. 1960); *Anderson v. Searles*, 107 A. 429, 430 (N.J. 1919); *Taylor v. Sheldon*, 173 N.E.2d 892, 895 (Ohio 1961); *Miller v. Pierce*, 361 S.W.2d 623, 625 (Tex. Civ. App. 1962); *In re Smith's Estate*, 57 N.W.2d 727 (Wis. 1953).

Dicta in federal court opinions are to the same effect. *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600, 604 (D. Mass. 1992); *Dixson v. Quarles*, 627 F. Supp. 50, 53 (E.D. Mich.), *aff'd mem.*, 781 F.2d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986).

[18] *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). After the court of appeals' decision in the present case, the Pennsylvania court followed that decision and its own *Cohen* decision in holding that the psychiatrist-patient privilege becomes a qualified privilege after the client's death where "criminal proceedings are conducted in the context of a grand jury investigation to solve the client's murder." *In re Subpoena No. 22*, Mich. No. 80099 of 1996, 1998 WL 86687, at *7 (Pa. Super. Ct. Mar. 2, 1998).

[19] *Curran v. Pasek*, 886 P.2d 272 (Wyo. 1994); *Merrill v. William Ward Ins. Co.*, 622 N.E.2d 743 (Ohio Ct. App. 1993); *Georgia Int'l Life Ins. Co. v. Boney*, 228 S.E.2d 731 (Ga. Ct. App. 1976).

privileges,[20] and the priest-penitent privilege.[21] These privileges survive death even though it is doubtful that, in most cases, the privileged communications would be chilled by fear of disclosure because the persons making them "have the worry of litigation in the back of their minds." *Jaffee v. Redmond, supra,* 518 U.S. at 24 (Scalia, J., dissenting). By contrast, persons consulting attorneys frequently are concerned about possible litigation (as Mr. Foster was), and it is thus fair to presume that the specter of posthumous disclosure in criminal litigation involving friends, family or associates would deter candor.

State case law holding that the attorney-client privilege survives death is supported by numerous state evidence codes providing that the privilege may be claimed after death by the client's personal representative.[22] These statutes reflect the position taken by the Model Code of Evi-

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[20] *Prink v. Rockefeller Ctr., Inc.*, 398 N.E.2d 517, 520 (N.Y. 1979); *Leritz v. Koehr*, 844 S.W.2d 583 (Mo. Ct. App. 1993); *Williams v. Kentucky*, 928 S.W.2d 942 (Ky. Ct. App. 1992); *Rittenhouse v. Superior Court*, 1 Cal. Rptr. 2d 595 (Cal. Ct. App. 1991); *Sims v. Georgia*, 311 S.E.2d 161 (Ga. 1984); *Jewell v. Holzer Hosp. Found. Inc.*, 899 F.2d 1507, 1513-14 (6th Cir. 1990) (applying Ohio law). *See* 1 *McCormick on Evidence* § 103 at 388 (4th ed.). *Contra*: *In re Subpoena No. 22, supra*, 1998 WL 86687.

[21] *Ryan v. Ryan*, 642 N.E.2d 1028, 1034 (Mass. 1994).

[22] "In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator)." *Restatement (Third) of the Law Governing Lawyers*, § 127, Comment c (Proposed Final Draft No. 1, March 29, 1996). *See also* the discussion of state statutes by Judge Tatel in his dissent. Pet. App. 17a-18a. State evidence codes allowing the personal representative of the deceased to assert the privilege include: Ala. R. Evid., Rule 502; Alaska R. Evid. 503; Ark. Code Ann. § 16-41-101, Rule 502; Cal. Evid. Code § 953; Del. R. Evid. 502; Fla. Stat. Ann. § 90.502; Haw. Rev. Stat. § 626-1, Rule 503; Idaho R. Evid. 502; Kan. Stat. Ann. § 60-426; Ky. R. Evid. 503; La. Code Evid. Ann. art. 506; Me. R. Evid. 502; Miss. R. Evid. 502; Neb. Rev. Stat. § 27-503; Nev. Rev. Stat. § 49.105; N.H. R. Evid. 502; N.J. Stat. Ann. 2A:84A, App. A,

dence, Rule 209(c)(1), and the Uniform Rules of Evidence, Rule 502(c).[23] Obviously, these statutes rest on the assumption that the privilege survives death. Rule 501 of the Federal Rules of Evidence provides that "reason and experience" shall govern the interpretation of a privilege and "it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee v. Redmond*, *supra*, 518 U.S. at 13.[24]

The court of appeals argues that, because state evidence codes are consistent with the notion that the privilege expires when the estate is closed, they involve only testamentary matters and thus do not indicate that the privilege survives death in a criminal context. Pet. App. 4a. Were the statutes generally so limited, one would expect to find language to that effect in them. But none of these statutes says that it is inapposite as to criminal matters or that the privilege expires when the estate closes.

Indeed, the Uniform Rules of Evidence provide not only that the personal representative can claim the privilege,

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N.J. R. Evid. 504; N.M.R. Evid 11-503; N.D. R. Evid. 502; Oh. Rev. Code Ann. § 2317.02; 12 Okla. Stat. Ann. § 2502; Or. Rev. Stat. § 40.225; S.D. Codified Laws § 19-13-4; Tex. R. Civ. Evid. 503 and Tex. R. Crim. Evid. 503; Vt. R. Evid. 502; Wis. Stat. Ann. § 905.03.

[23] This Court's 1972 Proposed Federal Rule of Evidence 503(c) would have maintained the privilege after death. *See* 56 F.R.D. 183, 236, 240 (1972). This Court in *Jaffee* found that the Proposed Rule relating to the psychotherapist privilege supported the position reached in that case. 518 U.S. at 14-15.

[24] State legislative support for the proposition that the attorney-client privilege survives death is far more consistent than the state support for the psychotherapist privilege that this Court found significant in *Jaffee*. 518 U.S. at 14 n.13, 26 (Scalia, J., dissenting). *Jaffee*, of course, recognized a new federal privilege; here we attempt to *preserve* an application of a long-recognized privilege that has been widely accepted by state legislatures and state and federal courts.

but also that "[t]he person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client." Uniform Rule 502(c). That provision—which on its face applies to any type of proceeding—is also common in state evidence codes,[25] and is found in the Arkansas statute that governs Mr. Foster's still-open estate.[26] Nothing in these statutes indicates that the privilege is limited, following the client's death, to civil proceedings. In *Cooper v. Oklahoma*, *supra*, 661 P.2d at 907, the court, citing a statute adopting Uniform Rule 502(c), allowed the deceased's attorney to claim privilege when called by the defense in a criminal prosecution.

The court of appeals and Independent Counsel draw their principal support from certain academic commentators. But even the commentators supporting Independent Counsel's view concede that the case law is otherwise. 1 *McCormick on Evidence*, § 94, at 348 (4th ed. 1992) ("The accepted theory is that the protection afforded by the privilege will in general survive the death of the client."); *Restatement (Third) of the Law Governing Lawyers* § 127 comment c (Proposed Final Draft No. 1, March 29, 1996) ("The privilege survives the death of the client. A lawyer for a client who has died has a continuing obligation to assert the privilege."); [27] *Wolfram, Modern Legal Ethics* § 6.3.4, at 256 (1986) ("In general, courts hold that the death of the client does not end the

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[25] Of the statutes cited in note 22, a provision allowing the lawyer at the time of the communication to claim the privilege appears in the statutes of Alabama, Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Vermont and Wisconsin.

[26] Ark. Code Ann. § 16-41-101, Rule 502.

[27] After describing the testamentary exception, the Reporter's Note states that, where this exception does not apply, the cases "routinely hold that the privilege survives." *Restatement*, *supra*, § 127 Reporter's Note.

privilege"); 24 Wright & Graham, *Federal Practice and Procedure* § 5498 at 483 (1986) (conceding that the "common law rule" is as stated by Wigmore—that the privilege, "being intended to secure a confidence on the client's part that no disclosure will be made . . . does not cease . . . upon the death of the client."); 2 Mueller & Kirkpatrick, *Federal Evidence* § 199 at 379 (2d ed. 1994) ("It is generally held that the privilege is not terminated even by the death of the client, although this view has been sharply criticized by commentators.") *Moreover, none of these commentators supports the court of appeals' view that there should be one rule for civil cases and another for criminal cases.*

Other prominent commentators argue forcefully that the rule should not be changed. Wigmore asserts:

> The subjective freedom of the client, which it is the purpose of the privilege to secure . . . could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might be used to the detriment of the client or of his estate.

See, 8 Wigmore, *Evidence* § 2323 (McNaughton rev. 1961). *See also* Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics, 45, 78-79 (1992): "[i]ndividuals do usually care about the dissemination of information about themselves, even after their deaths, and this concern will lead them to confide more fully in attorneys if they know that the privilege will outlive them." Other commentators recognize that the privilege survives death and make no call for changing the rule. Hazard and Hodes, *The Law of Lawyering*, § 1.6:101 at 131 (1998); *Weinstein's Federal Evidence*, § 503.32 at 503-96 (2d ed. 1997); Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, at 234 (3d ed. 1997); Rice, *The Attorney-Client Privilege in the United States*, §§ 2.5, 2.6 (1993).

4. Apparently recognizing the harmful effects of a broad rule allowing posthumous disclosure, the court of appeals attempted to limit the damage by confining disclosure to "the discrete zone of criminal litigation." Pet. App. 8a. But a client's concern for family, friends and associates surely will extend to their potential criminal as well as civil liabilities. An elderly or dying person may be troubled far more by a loved one's possible incarceration than by diminution of an inheritance caused by some civil sanction. Especially given the increasing utilization of criminal law as a means of commercial and ethical regulation, a client who believes that death is a not-too-distant possibility may be loath to speak to a lawyer about criminal problems involving friends, family or close associates if advised that confidentiality evaporates upon his or her demise.

The court of appeals attempted to distinguish between criminal liability, which "will have ceased altogether [after death]," and civil liability, which "characteristically continues" and which clients would wish to avoid in order to "preserve their estates [after death]." Pet. App. 6a. But as a practical matter, civil and criminal liability cannot be separated so easily. Disclosures made in the criminal context could be used in related civil matters, and a client's estate may be decimated as a result of criminal proceedings after his or her death. For example, a child's drug activities could lead to civil forfeiture of estate property. *See, United States v. One Parcel of Property, at 31-33 York Street*, 930 F.2d 139 (2d Cir. 1991) (house belonging to mother forfeited because sons used it for drug sales); *cf. Bennis v. Michigan*, 516 U.S. 442 (1996) (automobile partially owned by wife forfeited because husband used it for illegal sexual activities). Moreover, disclosure could cause investigation, prosecution, or conviction of an heir of the deceased client, which could result in fines or attorney fees that deplete the portion of the estate left to that heir.

Thus, even if the court of appeals were right in its implicit counter-intuitive assumption that clients would care about the economic, but not the criminal, consequences of posthumous disclosure on friends and family, in the real world criminal liability may have severe economic consequences. Moreover, if the court of appeals were correct in holding that a plausible claim of necessity in the criminal context allows posthumous disclosure, scant reason exists to deny it where a party in civil litigation plausibly claims the evidence is critical. Upholding the court of appeals' decision inevitably will lead to deterioration of the privilege in both the criminal and civil spheres.

5. The balancing test fashioned by the court of appeals does not ameliorate the damage inflicted on attorney-client confidentiality. The client is unlikely to be reassured when told that the conversation will be confidential except for statements whose "relative importance" to the prosecutor is "substantial." Pet. App. 10a. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond, supra*, 518 U.S. at 17 (1996) (patient-therapist privilege). Under the court of appeals' balancing test, the trial judge is most likely to perceive a need for privileged information in precisely those situations where the client would be most concerned about the criminal ramifications of disclosure on family, friends or associates. At the least, such a balancing test renders the attorney-client privilege uncertain, and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States, supra*, 449 U.S. at 393.

6. There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will make little difference. Pet. App. 8a-10a.

The court cited the so-called "crime-fraud" exception, but for this exception to apply "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). In addition, "the client must have carried out the crime or fraud." *Id.*[28] A client will know whether he or she consults an attorney to further a criminal or fraudulent scheme. And a client will know whether he or she, after receiving legal advice, has proceeded to commit a crime or fraud. Clients who are seeking advice in an attempt to comply with the law, or to lessen the consequences of past violation, are unlikely to be deterred from candor by advice that confidentiality may be destroyed by an intent to commit a future crime or fraud, followed by actual commission of the intended wrongdoing. The same cannot be said about an elderly, severely ill or suicidal client who is told that confidentiality will perish with death.

The court of appeals also invoked the "ubiquitous exception for litigation between persons claiming under the decedent" (Pet. App. 9a)—otherwise known as the testamentary exception. But disclosure is allowed in testamentary disputes for the purpose of determining the decedent's intent. *Glover v. Patten*, 165 U.S. 394, 406-08 (1897); *United States v. Osborn, supra*, 561 F.2d at 1340 n.11. "[I]f the decedent could be asked, he would want to waive the privilege so that the lawyer could dispose of the property according to his wishes." Hazard and Hodes, *The Law of Lawyering*, § 1.6:101 at 131 n.5.7 (1998). An exception designed to implement client intent does not support creating another exception to thwart it. Indeed,

[28] "In other words, the [crime-fraud] exception does not apply even though, at one time, the client had bad intentions. Otherwise, 'it would penalize a client for doing what the privilege is designed to encourage—consulting a lawyer for the purpose of achieving law compliance.'" *In re Sealed Case, supra*, 107 F.3d at 49, quoting *Restatement of the Law Governing Lawyers*, § 142 comment c, at 461 (Proposed Final Draft No. 1, 1996).

Glover, the leading case on the testamentary exception, is premised on the assumption that, except in that context, the privilege applies after death.

To be sure, as the court of appeals noted, there may be cases where implementation of testamentary intent necessitates disclosure of embarrassing information, such as the existence of an illegitimate child. Pet. App. 9a.[29] But it is fair to presume that the client would have wanted his or her testamentary intent fulfilled, even at the cost of an embarrassing disclosure. By contrast, disclosure in criminal proceedings about the client's family, friends or associates is not designed to implement the client's intent, and may have far more drastic consequences than mere embarrassment or hurt feelings. In that situation, a court cannot presume that, if the "decedent could be asked, he would want to waive the privilege." Hazard and Hodes, *supra*.

Finally, the court of appeals refers to decisions suggesting that criminal defendants in some situations may have a constitutional right to obtain and use as evidence otherwise privileged exonerating statements. Pet. App. 10a, citing dicta in *John Doe Grand Jury Investigation*, *supra*, 562 N.E.2d at 71-72; *South Carolina v. Doster*, *supra*, 284 S.E.2d at 220. There also are decisions by this Court holding that certain privileges created by state statute must yield to a defendant's constitutional right to confront or to obtain exculpatory information.[30] These cases at

[29] The governing statute in New York creates an exception from the testamentary rule for any privileged communication "which would tend to disgrace the memory of the decedent." N.Y.C.P.L.R. § 4503(b) (McKinney's 1992).

[30] *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Davis v. Alaska*, 415 U.S. 308 (1974). *See also United States v. Scheffer*, 118 S.Ct. 1261, 1264 (1998), where this Court (in a context not involving a privilege) said that exclusion of evidence may be "unconstitutionally arbitrary or disproportionate" where it "has infringed upon a weighty interest of the accused."

least suggest that courts may be inclined to find appropriate ways to protect a defendant's constitutional rights where privilege is claimed.[31]

But this case involves not a criminal defendant, but a *prosecutor's* attempt to obtain privileged evidence. The Court can decide the present matter without reaching the different issue of a defendant's possible constitutional right to privileged material.[32] If such a right exists, it would reflect our constitutional system's particular concern in avoiding jailing the innocent—a concern that affords criminal defendants unique rights.[33] To allow a prosecutor to break the privilege on the ground that a grand jury's constitutional right to investigate is on a par with possible constitutional rights of a criminal defendant would be a radical, problematic step fraught with unforeseen consequences.

[31] However, several state cases refused to allow an attorney to testify as to confidential communications from a deceased client, even though the evidence was sought to assist in the defense of a criminal prosecution: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 828-29 (Cal. Ct. App. 1984); *Cooper v. Oklahoma*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981). *Compare, Valdez v. Winans*, 738 F.2d 1087 (10th Cir. 1984), discussed at n. 6 *supra*. *But see District Attorney v. Magraw*, 628 N.E.2d 24 (Mass. 1994); *Arizona v. Gause*, 489 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); and *Wyoming v. Kump*, 301 P.2d 808 (Wyo. 1956) where, because of conflict or lack of authority, courts refused to allow a husband accused of murdering his wife to assert her attorney-client privilege.

[32] *Compare Jaffee*, *supra*, 518 U.S. at 18.

[33] For example, the prosecution must prove its case beyond a reasonable doubt; the defendant, innocent until proven guilty, may stand mute. The prosecution cannot appeal an acquittal; the defendant may appeal a conviction.

There is also a basic flaw in the argument that one more exception to the privilege should not be unduly injurious, given those that exist. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. All citizens—including the elderly and seriously ill—still have a right to talk to an attorney in confidence. The courts still have a paramount interest in assuring that clients tell their attorneys the whole truth. Most attorneys still take seriously their professional obligation to preserve confidences. Contrary to the court of appeals' conclusion, in most circumstances "belief in an absolute attorney-client privilege" is not, and should not be, "illusory." Pet. App. 8a. The court of appeals' reasoning can only further a progressive erosion of the privilege, as each added exception fuels the argument that yet one more can do little additional harm.

II. ATTORNEY NOTES TAKEN AT AN INITIAL CLIENT INTERVIEW ARE ENTITLED TO THE VIRTUALLY ABSOLUTE WORK PRODUCT PROTECTION AFFORDED AN ATTORNEY'S MENTAL IMPRESSIONS.

The court of appeals' determination that the notes at issue are not protected by the heightened work product standard rests on the apparently conclusive presumption that an attorney, in an initial client interview, is a passive note-taker and exercises no professional judgment in choosing what to record. Even Independent Counsel, in his opposition to the petition for a writ of certiorari, declined to defend this bizarre notion, which is contrary to existing law, the facts of this case, and the experience of the seasoned practicing attorneys whose views are expressed here by amici attorney associations.

1. The work product privilege "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). A

lawyer preparing a case must "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). If materials reflecting the lawyer's thoughts were open to opposing counsel, "much of what is now put down in writing would remain unwritten." *Id.* "Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. . . . And the interests of the clients and the cause of justice would be poorly served." *Id.*[34] "Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." *United States v. Nobles, supra*, 422 U.S. at 238.

From its adoption in the seminal decision of *Hickman v. Taylor, supra*, the work product privilege has been applied to attorneys' notes of witnesses' oral statements. In *Hickman*, the Court refused to require disclosure of "what [the attorney] saw fit to write down regarding witnesses' remarks." 329 U.S. at 513. The Court also accorded work product protection to attorney notes and memoranda of witness interviews in *Upjohn Co. v. United States, supra*. *Upjohn* held that "memoranda based on oral statements of witnesses" must be given "special protection" under Rule 26. 449 U.S. at 400. The Court reasoned that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends

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[34] Some insight into what the Court may have meant by "sharp practices" may be gained from the transcript of oral argument in *Hickman v. Taylor*. When asked by Justice Jackson what the practical effect would be of requiring production of the attorney interview notes, counsel responded: "In my judgment, interviews will go unrecorded, unpleasant sources will not be pursued, and counsel will be tempted to keep files under his bed at home." Quoted in 1 *McCormick on Evidence* § 96 at 358 (4th ed. 1992).

to reveal the attorney's mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 399.

Hickman and *Upjohn*, as well as lower court cases,[35] accorded heightened protection to initial *witness* interviews. The issue of work product protection for intial *client* interviews has not previously arisen (presumably because client interviews, until this case, have been protected by the attorney-client privilege). But there is even more reason to grant heightened work product protection to client interviews. At a witness interview, the attorney's principal focus likely is to elicit facts. By contrast, at a client interview—particularly an initial interview—the attorney also may outline the legal situation, discuss possible approaches, and explain the consequences and risks of various courses of action. For this reason, the notes of a client interview, even more than a witness interview, are likely to be permeated by the "attorney's mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 687.

2. The court of appeals held that "the ordinary Rule 26(b)(3) standard should apply" in determining whether an attorney's notes of an initial client interview must be produced to the prosecutor. Pet. App. 14a. Under that standard, the prosecutor obtains access to work product upon showing a "substantial need" for the material and inability to obtain the "substantial equivalent" of the material by other means "without undue hardship." Fed. R. Civ. Proc. 26(b)(3). But application of the ordinary Rule 26(b)(3) standard to attorney notes of initial client interviews transgresses *Upjohn* and the policies underlying the work product privilege.

The magistrate in *Upjohn*, as did the court of appeals here, applied the "substantial need" and "without undue

[35] *E.g., In re Allen*, 106 F.3d 582, 607 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 689 (1998); *Cox v. Administrator, U.S. Steel*, 17 F.3d 1386, 1421-23 (11th Cir.), *modified on reh'g on other grounds*, 30 F.3d 1347 (11th Cir.), *cert. denied*, 513 U.S. 1110 (1994).

hardship" tests of the ordinary Rule 26(b)(3) standard. 449 U.S. at 401. This Court reversed, holding that "a far stronger showing of necessity and unavailability by other means" is required. 449 U.S. at 401-2. The Court recognized that the lower courts had split on the degree of protection allowed attorney interview notes of witness interviews, with some courts holding that "*no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses," and others holding that such material is entitled to "special protection."[36] But the Court concluded that it need not resolve this conflict, because under either test the lower court had erred in applying the ordinary Rule 26(b)(3) standard. 449 U.S. at 401-02.

Subsequent lower court decision have followed *Upjohn*, holding that attorney interview notes are producible, if at all, "only in very rare and extraordinary circumstances." *In re Allen, supra,* 106 F.3d at 607; *Cox v. Administrator, supra,* 17 F.3d at 1421-23 (same); *In re Sealed Case,* 676 F.2d 793, 809-10 (D.C. Cir. 1982) ("extraordinary justification" required for disclosure).[37]

[36] 449 U.S. at 401 (emphasis in original), citing *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (absolute protection); *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (same); *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979) (disclosure in "rare situations").

[37] Independent Counsel previously has relied on two cases, but they do not support the court of appeals' application of a lesser standard. In *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979), the Third Circuit rejected absolute protection, concluding that attorney interview notes are producible in a "rare situation." 599 F.2d at 1231. It found the "rare situation" standard met in part because of the interviewee's death and in part for other reasons. 599 F.2d at 1231-32. In *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982), the Second Circuit, after noting that "the mental processes and legal theories of the interviewing attorney . . . are entitled to the greatest protection available under work-product immunity," held that, under the circumstances of that case, production of attorney interview notes would not reveal the attorney's mental processes.

The court of appeals asserted that *Upjohn* "did not decide whether factual elements embodied in [attorney interview] notes should be accorded the virtually absolute protection that the privilege gives to the attorney's mental impressions." Pet. App. 12a. It rested this conclusion on its assumption that the factual portions of the interview notes at issue in *Upjohn* were covered by the attorney-client privilege and thus were not involved in the Court's work-product ruling. Pet. App. 12a-13a. In fact, the interview notes on *Upjohn* included notes of interviews with seven former employees of the client company and this Court expressly said that its work product "discussion will also be relevant to counsel's notes and memoranda of interviews with [these seven] should it be determined [by the lower courts on remand] that the attorney-client privilege does not apply to them." 449 U.S. at 394 n.3, 397 n.6.

Moreover, the Court's reasoning in *Upjohn* made clear that the special protection afforded attorneys' "mental processes" extended to the factual portion of the interview notes. The Court equated "the attorney's mental processes" with "what he saw fit to write down," including "what [the attorney] considered to be the important questions, the substance of the responses to them . . . ." 449 U.S. at 399, 400 n.8 (quoting *Hickman v. Taylor, supra,* 329 U.S. at 516-17). The Court also relied on Justice Jackson's statement in *Hickman* that attorney interview notes are protected partly because they are in the attorney's "language, permeated with his inferences." *Hickman, supra,* 329 U.S. at 516-17 (Jackson, J., concurring), quoted in *Upjohn,* 449 U.S. at 399-400.

The notes taken by Mr. Hamilton were not verbatim, but were cast in his language. They reflect Mr. Hamilton's own "selections, interpretations, and interpolations"; as such, the notes "could not fairly be said to be the witness' own statement." *Palermo v. United States,* 360 U.S. 343, 350 (1959). Because they contain the attorney's language and selections rather than Mr. Foster's statement, they

would not be a "statement" producible under the Jencks Act.[38] For much the same reason, the notes are entitled to special protection under the work product privilege, reflecting as they do the attorney's perceptions of the case and his "mental processes" as he began to review the case.

Applying the ordinary standard of need of Rule 26(b)(3) to attorney interview notes has the effect of destroying the "privileged area within which [the attorney] can analyze and prepare his client's case." *United States v. Nobles, supra,* 422 U.S. at 238. At the time of taking interview notes, an attorney cannot possibly know how a court might view a prosecutor's assertion of "need" or unavailability of "substantially equivalent" material "without undue hardship." If disclosure hinges on application of those tests under the ordinary Rule 26(b)(3) standard, the attorney and client could be at peril whenever the attorney takes interview notes. The inevitable result would be that "much of what is now put down in writing would remain unwritten"—degrading the quality of case preparation and, ultimately, the administration of justice. *Hickman v. Taylor, supra,* 329 U.S. at 511.

3. The court of appeals apparently believed that the damaging effect of applying the ordinary Rule 26(b)(3) standard could be limited by confining it to attorney notes of initial client interviews. Pet. Ap. 13a. But it is particularly important not to discourage attorney note-taking at this stage. As recognized by a widely-used manual on trial technique, an accurate record of the initial interview is important because "[y]our client will never have a better

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[38] *See, Palermo v. United States,* 360 U.S. 343, 352-53 (1959) ("summaries of an oral statement which evidence substantial selection of material . . . are not to be produced"); *United States v. North American Reporting, Inc.,* 761 F.2d 735, 740 (D.C. Cir.) (notes "contain[ing] incomplete, episodic statements" are not witness statements) *cert. denied,* 474 U.S. 905 (1985); *United States v. Fowler,* 608 F.2d 2, 6 (D.C. Cir. 1979) ("short [and] very cryptic," "incomplete" notes "set[ting] forth a few references to scattered facts" are not witness statements).

grasp of the pertinent facts than at this stage." Lane, *Goldstein Trial Technique* § 1.03 at 3 (3d ed. 1996). Adequate notes taken "while the matter is fresh in the client's mind will prevent a later sketchy and perhaps incomplete recall of the facts" and "will prove extremely helpful, particularly where the trial takes place several years in the future." *Id.*, § 1.05 at 4.

Moreover, a client's subsequent recollections may be tainted by the "education" he or she acquires, during the course of litigation, as to what the facts "should" be in order to prevail. A lawyer who has taken adequate written notes at the initial interview will be better equipped to ensure that the client does not deviate from the truth to accommodate his or her developing perception of legal or tactical advantage. A rule that hampers the ability of a lawyer to perform this function only can injure the administration of justice. *Hickman v. Taylor, supra,* 329 U.S. at 511.

Nor can the danger of discouraging note-taking at initial client interviews be ameliorated by redaction, as the court below suggests. Pet. App. 14a. The redaction procedure presumes that the policies of the work product privilege are satisfied if explicit expressions of the attorney's opinions and mental impressions are protected from disclosure. But attorney interview notes also should be protected because disclosure would "tend[] to reveal the attorney's mental processes" by revealing " 'what he saw fit to write down regarding witnesses' remarks.' " *Upjohn Co. v. United States, supra,* 449 U.S. at 399, quoting *Hickman v. Taylor, supra,* 329 U.S. at 513. Redacting explicit statements of opinion from attorney notes is thus insufficient to protect the attorney's mental processes.

4. The court of appeals was particularly misguided in creating an apparently conclusive presumption that a lawyer taking notes at an initial interview "has not sharply focused or weeded the materials," thus rendering inappropriate the heightened protection accorded to "the attorney's

mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 399. This argument ignores the reality of the practice of law. As amici attorney associations confirm, it is totally unrealistic to assume that the lawyer plays a passive role in an initial interview, simply recording facts to be shaped into legal theories at some later stage. Instead, the initial interview serves the dual purpose of "obtaining an exhaustive account of the client's predicament *and outlining available solutions.*" Lane, *Goldstein Trial Technique* § 1.03 at 3 (3d ed. 1996) (emphasis added). At the initial interview, the attorney's task is not only to elicit facts, but also to "explore various approaches and possible action to be taken." *Id.*, § 4.02 at 5. Inevitably, as part of that process, the lawyer will wish to explore certain factual areas more intensely than others. And in recording the interview, the lawyer will emphasize certain factual elements over others, depending on his or her concept of what the problem areas are and what approaches might be fruitful. For these reasons, an attorney's account of an initial interview typically is cast "in language permeated with his inferences." *Hickman v. Taylor, supra,* 329 U.S. at 516-17 (Jackson, J., concurring).

The court below argued that an initial client interview is not deserving of special protection because the lawyer may encourage the client to engage in "a fairly wide-ranging discourse." Pet. App. 13a. While this may be true, the issue is not what the client says at the initial interview, but which portions of the client's "discourse" the attorney chooses to record and the words he or she selects to accomplish this. It is these choices the attorney's notes reflect and the work product privilege protects. *Upjohn Co. v. United States, supra,* 449 U.S. at 399.

The court of appeals' presumption that the lawyer is not sufficiently knowledgeable to play an active role at the initial interview also ignores the record of this case. Mr. Hamilton came to the meeting with Mr. Foster with considerable experience in highly-publicized, "political" cases.

As many attorneys do, he prepared for the "initial interview"; the record shows that he had read and taken notes on the White House's report on the Travel Office matter. Pet. App. 40, 41.

Moreover, as Judge Tatel observed, the notes themselves demonstrate that Mr. Hamilton exercised his professional judgment during the interview. "In two hours, he created only three pages of notes," which were not verbatim but contained only what "he thought significant, omitting everything else." Pet. App. 31a. Three pages of notes, to memorialize a two-hour interview, must be the product of a high degree of professional selectivity. The notes, as Judge Tatel observed, bear various markings ("check marks and question marks") and "clearly represent the opinions, judgments, and thought processes of counsel." *Id.*

The record thus fully supports the district court's factual finding that Mr. Hamilton's "written notes reflect the mental impressions of the lawyer . . . ." Pet. App. 42a. The court of appeals' conclusion to the contrary is unsupported by the record and fatally infected by the erroneous conclusive presumption that lawyers do not exercise professional judgment when they take notes during initial client interviews.

5. The court of appeals' work product decision, when coupled with its ruling on the attorney-client privilege, will have dire practical results. If clients are advised that their disclosures to an attorney might be unprotected after death, they may not talk candidly. If lawyers are advised that their notes of initial client interviews may be available to a grand jury, they may cease taking notes. The net result will be to degrade the administration of justice —lawyers are less likely to know the full truth about their clients' conduct and will not have a written record of what their clients initially said. And there will be no offsetting benefits, because grand juries will not benefit from client

statements that are not made and notes that are not taken. As Judge Tatel's dissent correctly observed, the court of appeals' "two new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process." Pet. App. 31a-32a.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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